1965

Robert H. Hinckley, Inc. v. State Tax Commission of Utah : Brief of Amicus Curiae

IN THE SUPREME COURT
of the
STATE OF UTAH

ROBERT H. HINCKLEY, INC.
a corporation,
Plaintiff,

vs.

STATE TAX COMMISSION
OF UTAH,
Defendant,

UTAH RETAIL MERCHANTS
ASSOCIATION,
Amicus Curiae.

Case No.
10260

BRIEF OF AMICUS CURIAE

PHIL L. HANSEN
Attorney General
JOSEPH B. ROMNEY
Assistant Attorney General
Attorneys for Defendant

YOUNG, THATCHER &
GLASMAN
PAUL THATCHER
1018 First Security Bank Bldg.
Ogden, Utah 84401
Attorneys for Plaintiff

LOUIS H. CALLISTER, SR.
LOUIS H. CALLISTER, JR.
800 Kennecott Building
Salt Lake City, Utah
Attorneys for Amicus Curiae

TABLE OF CONTENTS

AUTHORITIES CITED

TEXTS CITED

STATUTES AND SESSION LAWS

LEGISLATIVE AMENDMENTS

IN THE SUPREME COURT
of the
STATE OF UTAH

ROBERT H. HINCKLEY, INC.
a corporation,
Plaintiff,
vs.
STATE TAX COMMISSION
OF UTAH,
Defendant,
UTAH RETAIL MERCHANTS
ASSOCIATION,
Amicus Curiae.

Case No.
10260

BRIEF OF AMICUS CURIAE

RELIEF SOUGHT AND STATEMENT OF FACTS

The Utah Retail Merchants Association, a voluntary association of retail merchants doing business within the confines of the State of Utah, has heretofore filed a petition for leave to file a brief amicus curiae, in which it has requested that it be permitted to appear and make oral argument in the above matter.

On the 23rd day of September, 1965, by an order granting leave to appear as amicus curiae, signed by Chief Justice F. Henri Henriod, this request was granted.

This Honorable Court has heretofore made and entered its decision affirming the decision of the State Tax Commission sustaining assessments of sales and use tax deficiencies with respect to the sale of merchandise by vending machines.

The Court, in the course of its decision, has made certain observations and statements which we would like to call to the Court's attention:

> * * * Nor has our attention been called to any provision of our Sales Tax Act which makes it unlawful or prohibits a vendor from absorbing or paying the tax himself, if he so chooses. It does not necessarily follow from the fact that the 1937 amendment deleted the provision that the vendor had the option of collecting from the vendee or absorbing the tax himself that the legislature intended to prohibit or make it unlawful for a vendor to absorb or pay the tax himself. The Act still provides that the tax shall be collected and that the vendor is responsible for its collection * * *

This portion of the decision has raised consternation and questions with respect to the interpretation of Section 59-15-5, Utah Code Annotated 1953, as amended, as it pertains to the collection of the sales tax by the vendor; whether or not it is mandatory upon him to collect the same; and whether or not the 1937 amendment as referred to in the foregoing quoted portion of the opinion, by substituting the word "shall" for the word "may", has no meaning or effect.

We do not believe that it is the Court's intention and desire to give no meaning to the substitution.

The original statute pertaining to the subject matter referred to in the herein quoted decision appears in Chapter 20, Laws of Utah 1933, 2nd Special Session, and provides as follows:

> Every person receiving any payment or consideration upon a sale of property or service subject to the tax under the provisions of this act, or to whom such payment or consideration is payable (hereinafter called the vendor) shall be responsible for the collection of the amount of the tax imposed on said sales and shall, * * * *The vendor may, if he sees fit, collect the tax from the vendee,* * * *

It will be noted that the collection of the sales tax by the vendor was optional.

This Honorable Court, in the case of *W. F. Jensen Candy Co. v. State Tax Commission*, 61 P2d 629, in referring to this section made the following statement:

> * * * The vendor has the option to collect the tax from the vendee; that is, he may, "if he sees fit," do so. He may say to the vendee, "The tax is so much. You may either pay it or 'no sale' ", or he may, if he sees fit, elect to pay or absorb the tax himself. * * *

It is significant that immediately following this case the Legislature of the State of Utah saw fit to amend the section of the statute of the 1933 section of the sales tax laws herein quoted. This was

done by the 1937 session of the Legislature, and is as follows:

> Sec. 59-15-5.
>
> * * * Every person receiving any payment or consideration upon a sale of property or service subject to the tax under the provisions of this act, or to whom such payment or consideration is payable (hereinafter called the vendor) shall be responsible for the collection of the amount of the tax imposed on said sale; provided however, that where any sale of tangible personal property is made by a wholesaler to a retailer, upon the representation by the said retailer that the said personal property is purchased by the said retailer for resale, and the said personal property thereafter is not resold, the wholesaler shall not be responsible for the collection or payment of the tax imposed on the said sale, but the said retailer shall be solely liable for the said tax. The vendor *shall* collect the tax from the vendee, * * *

ARGUMENT

In view of the statements of the majority of this Honorable Court quoted herein, the question arises whether the 1937 amendment is just a play on words; that the Legislature, by substituting the word "shall" for the word "may", had no purpose whatsoever in making such amendment.

We, of course, do not believe that this Honorable Court intended either of the two constructions.

This Honorable Court, in the case of *Ralph Child Construction Company v. State Tax Commis-*

sion, 362 P2d 422, made the following statement with respect to the portion of the statute in question:

> It is generally recognized that "courts will give an act such a construction as will accomplish" its purpose. The purpose of this act was to collect the sales tax from the person liable to pay it without hardship or injustice. The retailer is required to collect the tax from the consumer and pay it to the Commission as a matter of convenience. But the primary liability to pay the tax is placed on the consumer. * * *

We feel that this Court in making the statement "*the retailer is required to collect the tax*" should dispose of our fears in this matter. However, we would like to make some observations in regard to this matter.

The law is fundamental that in every amendment of a statute, the Legislature intended that it was made to effect some purpose.

It cannot be presumed that it was coincidental that the Legislature amended the act after the Court's interpretation in the *Jensen* case, supra, where it said the collection was optional, to that of making it mandatory to collect it.

Certainly the Legislature intended a change when it changed the statute from the option of the vendor to collect the tax — 1933 Act, that is, he vendor *may*, if he sees fit, collect the tax from the vendee, to the 1937 amendment, the vendor *shall collect the tax from the vendee.*

The general rule is that a change in phraseology indicates persuasively, and raises a presumption, that a departure from the old law was intended. It must be assumed that the Legislature had a reasonable motive.

> *50 Am. Jur., Sec. 275, Page 261,* and cases set forth therein.

The amendment of an existing act indicates that a change was intended.

Hopson v. North American Ins. Co. 233 P2d 799.

The presumption is that every amendment of the statute is made to effect some purpose, and effect must be given the amended law in a manner consistent with the amendment.

> *50 Am. Jur., Sec. 275, Page 262,* and cases set forth therein.

In enacting legislation upon a particular subject, the law making body is presumed to be familiar not only with its own prior legislation relating to the subject, *but also with the court decisions construing such former legislation.*

In re Levy, 23 Wash. 2d 607, 161 P2d, 651 ALR 805.

It would seem that there is no other conclusion than that the Legislature, by amending the statute immediately after the *Jensen* case, supra, in the particular which has been emphasized herein, that it had the *Jensen* case in mind when it made the

substitution of the word "shall", which we feel is mandatory, to the option of collecting the sales tax. This is certainly a reasonable and proper assumption to be made under the facts in this case.

The Utah statute in question is very comparable to that of the State of Washington. We feel that the case of *Morrow vs. Henneford*, 47 P2d 1019, is very pertinent to the question involved herein:

> Section 21 of the act provides that the tax imposed under title 3 shall be paid by the buyer to the seller, and it is made a duty of the seller to collect from the buyer the full amount of the tax payable in respect of each sale, and in case any seller fails to collect the tax, he is primarily liable to the state for the amount.
>
> The appellant objects to this provision as imposing the burden of an uncompensated service upon him. This provision, as we view it, is an administrative detail, since the consumer always ultimately pays. *It is the evident purpose of the law to make for honest dealing by having the purchaser pay the tax in the first instance, so that no opportunity is offered the seller to increase the price to the consumer beyond the definite amount of the tax.*

There is some fear under the interpretation of the decision in this cause that the door is open for a vendor to absorb or pay the tax, as he chooses. This, of course, would be contrary to the interpretation of most merchants to the effect that the vendor *shall* collect the tax.

If a merchant takes the position that he can absorb the tax or pay it, as he chooses, he, of course, uses certain advertising gimmicks, such as that the consumer or purchaser does not have to pay a sales tax when doing business with him, or that there is no sales tax at his establishment. This, of course, opens the door to the purchasing public getting hurt. Sales tax on large equipment or automobiles amounts to a substantial sum.

If the purchaser relies upon the merchant that there is no tax, or that the merchant will absorb it or pay it, and the merchant does not do so, the purchaser, of course, is then liable in accordance with Utah law.

As this Honorable Court stated in the *Child* case, supra, where the retailer fails to collect the tax, the Commission could assess the tax against the ultimate consumer or purchaser and collect the same from him.

The act in question here is not the only time that the Legislature has seen fit to have the purchasing public appraised of a tax. For illustration, in Section 15-1-2a, Utah Code Annotated 1953, entitled "Conditional sale of tangible personal property not to exceed $7500 cash price", the Legislature of the State of Utah, in addition to compelling the seller to set forth the amounts to be paid to any public officer as fees in connection with the sales transaction, requires that the seller must set

forth in great detail the various items making up the purchase price of the article sold.

This type of legislation is becoming more prevalent in the various states of the Union as a protection to the purchasing public. It seems to us that the statute is very clear, that it is mandatory upon the vendor, to collect the tax. That the Legislature without question had a purpose and motive in substituting the word "shall" for the previous option of collecting the tax, as provided in the 1933 Session Laws.

Such an amendment that the Legislatur made in 1937 was a progressive one and one aimed at protecting the purchasing public.

It was, also, of course one to assist the Tax Commission in its auditing procedures with the vendors.

There is no question as to the right of the Legislature to make it a condition of selling an article, for the vendor to collect the tax imposed on the transaction.

Certainly the Legislature had a purpose and motive in doing this, particularly when we realize that it was done immediately after the *Jensen* case, supra.

It must be remembered that in Utah, if the retailer fails to collect the tax or to report the sale, or if he should go into bankruptcy, go out of business or become insolvent, then, because this is a

tax on the consumer, the consumer is liable therefor.

If the vendor may absorb or pay the tax himself, and so advises the consumer, and does not pay it, then is not the consumer still liable? Where a vendor may advertise that he will absorb the tax or that in his place of business there is no tax to be paid, and then he does not pay the tax, the consumer must pay it.

Does this not open the door to loose practices that the Legislature intended to correct by the 1937 amendment? If the door is open to such practices, the purchasing public can be hurt.

Where a vendor is required to collect the tax and the vendee or purchaser knows that, and the sales tax is a part of the purchase price and he so pays it, then there is no chance of damage to him.

Statutory construction compels the giving of the amendment a purpose and an effect. This cannot be disregarded.

CONCLUSION

We sincerely feel that the majority of the Court, by its decision, did not intend to disregard the substitution of the word "shall" for the option of collecting the tax and imply that there was no difference.

We feel that in the absence of a clarification

of the Court in this decision, that some confusion may exist among the selling public. That is, that a merchant is not required to collect the sales tax, but that he may absorb or pay it himself, as was his privilege prior to the 1937 amendment.

We sincerely trust that this Honorable Court will see its way clear to amend its decision in such a way as to dispel any confusion or question as to whether or not the vendor is relieved from his obligation to collect the tax, and that he may not absorb it or pay it himself and thereby defeat the purpose of the act, namely, to collect it, so that the purposes of the act as intended by the Legislature may be fulfilled.

Respectfully submitted,

LOUIS H. CALLISTER, SR.
LOUIS H. CALLISTER, JR.
Attorneys for Utah Retail Merchants Association, Amicus Curiae
800 Kennecott Building
Salt Lake City, Utah